

**Tentative Rulings for September 24, 2003
Departments 22, 70, 72, 73**

There are no tentative rulings for the following cases. The hearing will go forward on these matters. If a person is under a court order to appear, he/she must do so. Otherwise, parties should appear unless they have notified the court that they will submit the matter without an appearance. (See California Rules of Court, Rule 321(c).)

02CECG01849	White v. Badvelian (Dept. 70)
0598159	Western Farm Service v. Richard (Dept. 70)
03CECG02729	In r Mario Ortiz Jr (Dept. 72)
03CECG03065	L & W Supply Corp v. Zamora (Dept. 70)
0650182	Kashian v. Zinkin Family (Dept. 73)
02CECG03384	Morgan v. Penny (Dept. 73)
0477743	O'Neill Irrigation Supply v. Mauldin-Dormeir Construction (Dept. 73)
0645124	Contreras v. Brown (Dept. 73)

(Tentative Rulings begin at next page)

Tentative Ruling

Re: **State of California v. Sorrenti, et al**
Superior Court Case No. 03CECG00600

Hearing Date: September 24, 2003 **(Dept. 70)**

Motion: By the Sorrentis for a protective order and for monetary sanctions

Tentative Ruling:

To issue limited protective order as described below and to deny both requests for monetary sanctions.

Explanation:

While defendants claim in the moving papers that much of the information sought is “irrelevant” to the pending litigation, they have not identified any specific question that is not directly relevant to the scope and valuation of the damages they have claimed in their answer, and plaintiff’s opposition ties most of the interrogatories to specific contentions that they themselves have raised. The only specific examples of “unnecessary” questions cited by defendants are those identified on page 1 of the supporting memo:

Interrogatory #103 asks whether defendants have ever attempted to sell or transfer any business or business assets operated on the subject property. This is one of the series of questions identified by plaintiff as relating to valuation of the business “goodwill” that defendants claim in their answer. The factors relevant to both whether an eminent domain defendant is **entitled** to “goodwill” compensation, and if so, how much that compensation will be, are described in 8 Witkin ***Summary of California Law*** (9th Ed. and 2003 Supp.) “Constitutional Law” §1031, and BAJI 11.91 and 11.93.

Once entitlement to goodwill is established (the burden of which is on the landowner to prove), both sides will need to present proof as to valuation, and evidence concerning prior attempts to sell the business or its assets appears relevant to that determination.

Defendants also point to the RFP #35, which seeks visual depictions of the fixtures, equipment and other tangible assets used on the subject property. This too has been identified by plaintiff as relating to the claim for goodwill damages. While the connection between such evidence and the existence and value of goodwill is not necessarily as clear as for some of the other requests, there is no limit on the number of RFPs that can be propounded. Therefore unlike the case with a request for protective order in relation to excess interrogatories, the burden of

proof is on the party seeking the protective order to show “good cause” for its issuance. Weil & Brown, **Civil Procedure Before Trial**, 8:1454.10 [citing **Stadish v. Superior Court** (1999) 71 Cal.App.4th 1130, 1145].

The only aspect of the subject discovery requests at issue here for which the burden of response appears to outweigh the potential benefit of the information, is the request for a specific list of all documents supporting each of the contentions described in the interrogatories, i.e. #8, 11, 14, 17, 20, 23, 26, 29, 32, 35, 38, 41, 44, 47, 50, 53, 56, 59, 76, 98, 102, 116 and 119.

These interrogatories seek identification of the same documents requested in the RFPs in general, and RFP #59 in specific. If defendants simply produce the supporting documents, there should be no need to list the same documents in response to the above interrogatories. The court will therefore issue a protective order relieving defendants from having to respond to these 23 interrogatories.

As for sanctions, neither party appears to have engaged in any serious attempt to resolve this dispute without a hearing. Defendants made a blanket objection to the number of questions without identifying how any of the information sought was irrelevant or unnecessary to plaintiff's defense against defendants' claim for additional condemnation damages.

And their claim that the same information could be obtained through deposition is belied by the holding in ***Rifkind v. Superior Court***, 22 Cal.App.4th at 1259, that it is improper to ask a party deponent to state or explain his or her legal contentions in the case, or to designate documents or evidence supporting those contentions. [See Weil & Brown, ***supra***, 8:723.]

On the other hand there does appear to be a significant amount of duplication between the interrogatories and RFPs, and therefore some justification for defendants having brought this motion. Under the circumstances, both requests for sanctions will be denied, and each party will be required to bear its own fees and costs.

Pursuant to California Rules of Court, rule 391, subd. (a) and Code of Civil Procedure section 1019.5, subd. (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order. Defendants will have 20 days from service of this order in which to respond to the subject discovery.

Tentative Ruling **hac** **9/23/03**
Issued By: _____ **on** _____.
 (Judge's initials) (Date)

Tentative Ruling

Re: **Farmers Insurance Exchange v. Wersching**
Superior Court Case No. 01CECG00888

Hearing Date: September 24, 2003 (**Dept. 22**)

Motion: Defendant's Motion to Compel

Tentative Ruling:

The hearing is continued to October 7, 2003, at 3:30 p.m., Dept. 22.

Pursuant to California Rules of Court, rule 391, subd. (a) and Code of Civil Procedure section 1019.5, subd. (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling **DSB** **9/23/03**

Issued By: _____ **on** _____ .

(Judge's initials) (Date)

Tentative Ruling

Re: **Marin v. Kirby-Jones**
Superior Court Case No. 03CECG02010

Hearing Date: September 24th, 2003 (**Dept. 72**)

Motion: Defendant Ramona Kirby-Jones' Motion to Strike Punitive Damages Allegations

Tentative Ruling:

To grant the motion to strike the prayer for punitive damages (complaint, paragraph 14a(2)). (CCP §§ 435, 436.)

Explanation:

Plaintiff has failed to plead any facts showing that defendants acted with malice, fraud or oppression. (Civil Code § 3294.) Plaintiff simply alleges that “Defendant Ramon Kirby-Jones negligently entrusted a motor vehicle to Timothy James. Timothy James operated a motor vehicle without a license to do so and in such a reckless and unsafe manner as to cause great bodily injury, property damage, loss [sic] wages, loss of earning capacity and severe and extreme emotional distress to plaintiff.” (Complaint, ¶ MV-2f.) These allegations are insufficient to show either malice, fraud or oppression on the part of defendants, and therefore plaintiff has not shown that he is entitled to punitive damages.

Pursuant to CRC 391(a) and CCP §1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling **S J KANE** **9/22/03**

Issued By: _____ **on** _____.
 (Judge's Initials) (Date)

Tentative Ruling

Re: **Macedo v. D'Ambrosio**
Superior Court Case No. 03CECG00269

Hearing Date: September 24th, 2003 (**Dept. 70**)

Motion: Plaintiff Macedo's Motion to Compel Answers to Special Interrogatories (Set Three) and Request for Monetary Sanctions

Tentative Ruling:

To grant the motion to compel defendant D'Ambrosio to respond to the special interrogatories, set three. (CCP § 2030(k).) To grant the request for monetary sanctions, in the amount of \$200. Defendant shall serve verified responses to special interrogatories, set three, without objections within 10 days of the date of service of this order. Defendant shall pay monetary sanctions within 30 days of the date of service of this order.

Pursuant to CRC 391(a) and CCP §1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling **HAC** **9/23/03**

Issued By: _____ **on** _____.
 (Judge's Initials) (Date)

Tentative Ruling

Re: **Florentino v. Chaderjian**
Superior Court Case No. 02CECG03122

Hearing Date: September 24th, 2003 (**Dept. 72**)

Motion: Defendants' Motion for Summary Judgment

Tentative Ruling:

To grant the motion for summary judgment. (CCP § 437c.)

Explanation:

Plaintiff has alleged causes of action for general negligence and premises liability. However, defendants contend that plaintiff cannot prevail on his claims because plaintiff has been deemed to have admitted the truth of all matters in the requests for admissions. The court granted the order deeming plaintiff to have admitted the truth of the matters in the RFA's on June 5th, 2003. (See Exhibit B to Statement of Undisputed Material Facts.) Therefore, plaintiff is deemed to have admitted (1) that his alleged injuries were not sustained, wholly or partially, in the incident; (2) that defendant was not negligent in or about the area of the incident at the time of its occurrence; (3) that prior to the incident, plaintiff had knowledge of the alleged condition upon which you were allegedly injured; (4) that prior to the incident, defendant did nothing to cause the condition upon which plaintiff was allegedly injured; (5) that the condition upon which plaintiff as allegedly injured did not constitute a dangerous condition of defendants' property; (6) that the condition upon which plaintiff was allegedly injured was open and obvious; (7) that plaintiff's actions and/or inactions were the sole cause of the incident; (8) that plaintiff's actions and/or inactions were a partial cause of the incident; and (9) that defendants warned plaintiff of all conditions which allegedly resulted in the occurrence of the incident.

The elements of a cause of action for negligence are: (1) defendant's duty of care toward the plaintiff; (2) defendant's breach of duty; (3) injury to plaintiff as a result of the breach, and (4) damage to plaintiff. (4 Witkin, Cal. Procedure (4th ed. 1997) § 537, p. 624.) Premises liability is merely a species of negligence. (*Id.* at § 539, p. 629.) In light of plaintiff's admissions, defendants have met their burden of showing that plaintiff cannot prove essential elements of his causes of action. (CCP § 437c(p)(2).) For example, plaintiff's admission of RFA no. 1 prevents him from establishing that he suffered damages from the incident. The admission of RFA no. 2 prevents plaintiff from showing that defendants

were negligent in or around the area of the incident at the time of its occurrence. The admission of RFA no. 4 prevents plaintiff from establishing that defendant's caused the dangerous condition. Therefore, defendants have met their burden of showing that plaintiff cannot establish one or more of the essential elements of his claims. Since plaintiff has not filed opposition to the motion, he has failed to meet his burden of showing that there is a triable issue of material fact. (CCP § 437c(p)(2).) Consequently, defendants are entitled to summary judgment as to the entire complaint.

Pursuant to CRC 391(a) and CCP §1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling **S J KANE** **9/22/03**
Issued By: _____ **on** _____.
 (Judge's Initials) (Date)

Tentative Ruling

Re: **DeLeon v. Wells**
Superior Court Case No. 650055-7

Hearing Date: September 24, 2003 (**Dept. 70**)

Motion: Petition to compromise minor's claim

Tentative Ruling:

To deny without prejudice, unless petitioner or attorney can appear at the hearing with a verified amended petition that cures the defects listed below. Minor is excused from appearing.

Explanation:

There is no order appointing Grace Soto as the guardian ad litem for the minor.

The petition states that attorney H. Ty Kharazi is not representing anyone else in the lawsuit, which appears to be an incorrect statement. (Cal. Rules of Court, rule 7.951(3).)

The petition states that the attorney does not expect to receive attorneys fees, yet the petition seeks attorneys fees in the amount of 460.00. (Cal. Rules of Court, rules 7.950(6), 7.951(5).)

The petition does not state whether damage payments are being made to others, and it appears that they are. (Cal. Rules of Court, rule 7.950(9).)

The petition does not explain why notice has not been given under Welfare & Institutions Code section 14124.73. (Cal. Rules of Court, rule 7.940(13).)

No order for the deposit of funds was submitted.

Pursuant to California Rules of Court, rule 391, subd. (a) and Code of Civil Procedure section 1019.5, subd. (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

HAC

9/23/03

Issued By: _____ **on** _____.

(Judge's initials) (Date)

Tentative Ruling

Re: **Pelosso v. Stayner**
Superior Court Case No. 0640932

Hearing Date: September 24, 2003 (**Dept. 70**)

Motion: By plaintiffs Jose Pelosso and Raquel Pelosso, individually and as co-administrators of the Estate of Silvina Pelosso, to take defendant prisoner's deposition in prison

Tentative Ruling:

To deny.

Explanation:

Plaintiffs have presented no authority that would allow the court to appoint counsel to represent defendant Cary Stayner at the deposition to ensure that his Fifth Amendment right against self-incrimination is protected. Plaintiffs have not shown that Government Code section 27706, subdivision (c), the sole authority cited to support the appointment of counsel, is applicable to this case.

Pursuant to California Rules of Court, rule 391, subd. (a) and Code of Civil Procedure section 1019.5, subd. (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling **HAC** **9/23/03**

Issued By: _____ **on** _____.

(Judge's initials) (Date)

Tentative Ruling

Re: **Bailey v. CSUF**
Superior Court Case No. 02CECG01836

Hearing Date: September 24, 2003 (**Dept. 70**)

Motion: By defendants to dismiss plaintiffs' action for failure to obey court order and for monetary sanctions.

Tentative Ruling:

To deny.

Explanation:

The motion is denied for two reasons. First, the motion is based on failure to obey a court order. However, the clerk's certificate of mailing shows that the order was not mailed to plaintiffs' correct addresses. It would be patently unfair to dismiss the action based on a court order that was never served on plaintiffs. Second, plaintiffs indicate in their declarations that they served supplemental responses to discovery prior to defendants filing their motions to compel. If it is true that defendants' now have the discovery they were seeking in their motions to compel, a dismissal sanction would be inappropriate in any event because it would go beyond what was necessary to obtain the objects of the discovery sought, and would improperly place the prevailing party in a better position than if discovery had been obtained. (See *Wilson v. Jefferson* (1985) 163 Cal.App.3d 952, 958; *Caryl Richards, Inc. v. Superior Court* (1961) 188 Cal.App.2d 300, 303-304.)

Pursuant to California Rules of Court, rule 391, subd. (a) and Code of Civil Procedure section 1019.5, subd. (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

HAC

9/23/03

Issued By: _____ **on** _____.
 (Judge's initials) (Date)